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IN THE

Supreme Court of the United States

October Term, A. D., 1955

No. 428

CADILLAC PUBLISHING COMPANY, INC.
A Corporation
Petitioner,

v.

ARTHUR E. SUMMERFIELD,
Postmaster General of the United States
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Reasons Relied on for Allowance of Writ.

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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IN THE

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CADILLAC PUBLISHING COMPANY, INC.
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Petitioner,

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ARTHUR E. SUMMERFIELD,
Postmaster General of the United States

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit and Reasons Relied on for Allowance of Writ.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Cadillac Publishing Company, Inc., a Corporation, respectfully petitions this Honorable Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

I. OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 31) (App. 25) is reported in —— F.2d ——.

II. JURISDICTIONAL STATEMENT

Jurisdiction of this Honorable Court to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, dated June 30, 1955, and entered June 30, 1955, is invoked under the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U.S.C.A. 1254).

III. QUESTIONS PRESENTED

1. Does the Federal judiciary under its equity and declaratory judgment powers, have jurisdiction to entertain, consider and determine applications for relief against the admittedly unlawful and wrongful acts of a government agency directed against a citizen and threatening his property rights, prior to the issuance by the agency of an order seizing the citizen's property, where constitutional and statutory guarantees are involved?

2. Can the Administrative Procedure Act of 1946 be judicially construed and interpreted to mean that a person (or corporation) ordered to proceed by a government agency in an administrative adjudication proceeding of an adversary nature, must first submit to and follow unpublished organization and procedure not meeting the requirements of said act or the principles of due process of law, before judicial intervention can be sought and obtained, notwithstanding the clear language of said act that "no person shall in any manner be required to resort to organization or procedure not so published"?

3. Does the head of an administrative agency, charged with specific duties and given specific quasi-judicial powers and authority by statute, have the right to delegate such powers and authority to a subordinate, in the absence of specific authority from Congress to do so?

4. Is the doctrine of exhaustion of administrative remedies applicable in a case where no proper or lawful remedy can be said to be available in the administrative proceeding, after a respondent has successfully defended on the merits against a prosecuting official's complaint before an independent administrative tribunal?

IV. STATUTES AND RULES INVOLVED

1. The pertinent portions of Sec. 259a, Title 39, U.S.C. (64 Stat. 451) under which the Acting Solicitor filed his complaint against appellant with the Office of Hearing Examiners for the Post Office Department, provide:

> "Upon evidence satisfactory to the Postmaster General that any * * * corporation * * * is obtaining, or attempting to obtain, remittances of money or property * * * through the mails for any obscene * * * matter * * *, the Postmaster General may—
>
> "(a) instruct postmasters at any post office * * * to return all matter (addressed to such corporation) to the postmaster at the office at which it was originally mailed, with the word 'Unlawful' plainly written or stamped upon the outside thereof * * *, and
>
> "(b) forbid the payment by any postmaster to any such * * * corporation * * * of any money order or postal note drawn to the order of such * * * corporation * * *."

2. The pertinent portions of the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, dated November 6, 1952, which were the Rules of Practice in existence at the time the Post Office Department's complaint against appellant was brought, and which were in effect at the time the Hearing Examiner heard the case and rendered his decision, are set forth in the appendix hereto (App. 29).

3. The pertinent portions of the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, amended January 20, 1954, are set forth in the appendix hereto (App. 31).

4. The Declaratory Judgment Act of June 25, 1948, c. 646, 62 Stat. 964, as amended (28 U.S.C.A. 2201, 2202), provides:

"§2201. In a case of actual controversy within its jurisdiction, * * *, any court of the United States * * *, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

"§2202. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

5. The pertinent portions of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, as amended (5 U.S.C.A. 1001, et seq.), are as follows:

"§3 (5 U.S.C.A. 1002). Publication of information, rules, opinions, orders and public records.

"(a) Every agency shall separately state and currently publish in the Federal Register * * * (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal procedures available * * * and (3) substantive rules adopted as authorized by law * * *. No person shall in any manner be required to resort to organization or procedure not so published."

"§4 (5 U.S.C.A. 1003). Rule making.

"(a) General notice of proposed rule making shall be published in the Federal Register * * *."

"§5 (5 U.S.C.A. 1004). Adjudications.

"(c) * * * No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the

decision, recommended decision, or agency review pursuant to section 8 of this title except as witness or counsel in public proceedings. * * *."

"§8 (5 U.S.C.A. 1007). Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

"(a) In cases in which the agency has not presided at the reception of evidence, the officer who presided * * * shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. * * *."

"§10 (5 U.S.C.A. 1009). Judicial review of agency action.

"Except so far as (1) statutes preclude judicial review or (2) the agency action is by law committed to agency discretion

"(a) Any person suffering legal wrong because of any agency action, * * *, shall be entitled to judicial review thereof.

"(c) * * * every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. * * *.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, * * * found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short

of statutory right; (4) without observance of procedure required by law; * * *."

6. The pertinent portions of the Federal Register Act, June 26, 1935, c. 417, §5, 49 Stat. 501 (44 U.S.C.A. 305), provide:

"There shall be published in the Federal Register * * * such documents as may be required so to be published by Act of Congress. * * *."

V. STATEMENT OF THE CASE

Petitioner filed in the United States District Court for the District of Columbia, its complaint (R. 2) and amended complaint (R. 20) against the Postmaster General, the cause of same being as follows:

1. Petitioner was charged in a complaint filed before the Office of Hearing Examiners for the Post Office Department by the Acting Solicitor for the Post Office Department, with violation of Sec. 259a, Title 39, U.S.C. (64 Stat. 451) (Supra, p. 3). The complaint of the Acting Solicitor concluded with the statement: "it is recommended that the Postmaster General issue an order to the Postmaster at New York, New York, to dispose of all mail addressed for delivery to and money orders drawn in favor of Cadillac Publishing Company, Inc." Issue was joined, a formal hearing was held before a duly appointed Hearing Examiner, evidence was introduced on both sides, and an initial decision in favor of this petitioner was subsequently entered by the Hearing Examiner dismissing the complaint. The Solicitor noted an appeal, and the Assistant Solicitor who prosecuted the case filed a brief on appeal with the Office of Hearing Examiners, in which it was again demanded that the *Postmaster General* "forthwith" issue the order requested in the complaint. Petitioner (respondent before the Department) filed with the Office of Hearing Examiners its motion to dismiss the

appeal and strike the notice and brief, on grounds of lack of jurisdiction. All of the proceedings up to that point had been conducted before the Office of Hearing Examiners, supposedly under the Post Office Department's Rules of Practice in Proceedings Under the Administrative Procedure Act, dated November 6, 1952 (R. 9; App. 29), which gave the Office of Hearing Examiners full and absolute control over the question of whether or not a complaint submitted by the Office of the Solicitor would lie. No provision was made for an appeal by the Solicitor from a Hearing Examiner's rejection or dismissal of a complaint. It was the intention of the drafters of said Rules, and the language thereof read in context could only be so interpreted, that an appeal was allowable only to a respondent adversely affected by a Hearing Examiner's initial decision.

The aforesaid motion to dismiss the Assistant Solicitor's appeal was denied by order of a Deputy Postmaster General, with a mandate to answer the Assistant Solicitor's appeal brief by a day certain.[1] Concurrent therewith there was delivered to petitioner a copy of new Rules of Practice in Proceedings Under the Administrative Procedure Act, amended effective January 20, 1954 (R. 12; App. 31), changing the prior rules by removing the initial authority of the Hearing Examiner to pass on the validity of a Solicitor's complaint; by delegating all of the Postmaster General's statutory quasi-judicial authority to a Deputy Postmaster General and his Administrative Assistant as the final quasi-judicial authority over administrative ap-

[1] Instead of complying with the Deputy Postmaster General's order to proceed, respondent (petitioner here) filed its action in the U. S. District Court for the District of Columbia for a declaratory judgment and injunctive relief. No injunction pendente lite was sought, since it appeared that no action would be taken by the Post Office Department in the light of respondent's motion for a stay of proceedings pending the outcome of this litigation, and none has been taken to date.

peals in adversary proceedings, and otherwise attempting to overcome the objection made by petitioner to the Solicitor's action. No notice of intention to promulgate said new rules of January 20, 1954 was ever given, no hearings thereon were held, and same were never published in the Federal Register as required by Secs. 3 and 4 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238; 5 U.S.C.A. 1002, 1003) (supra, p. 4), and as required by Sec. 5 of the Federal Register Act of June 26, 1935 (49 Stat. 501; 44 U.S.C.A. 305) (supra, p. 6).

2. Petitioner further alleged that it is a reputable publishing company, publishing and distributing books on a variety of subjects, some of which are advertised and sold through the United States mails, and that it has a large and substantial investment and interest in its mail-order business (R. 2). It was further alleged that the publication in question had been the subject of a previous action against this petitioner before the Office of Hearing Examiners for the Post Office Department, on complaint of the same prosecuting official in the Solicitor's office, and that action also resulted in a final dismissal of the complaint after hearing (R. 3). Petitioner after the second dismissal, in the interest of cooperating with a government agency, voluntarily offered to eliminate the cause of the Acting Solicitor's complaint against its advertising procedures. The Solicitor countered with a demand that the book in question be sold only under terms dictated by the Solicitor, namely only to professional readers or on prescription of a physician. Petitioner further alleged that it is the intention of representatives of the Postmaster General to continue to harass petitioner until it submits to the unlawful demands of said officials of the Post Office Department (R. 7).

3. Petitioner further alleged that it had exhausted all administrative remedies available to it (R. 7); that there was no jurisdiction in a Deputy Postmaster General over

petitioner, as the delegation to him of the Postmaster General's statutory quasi-judicial authority was unlawful (R. 6); that such action contemplates a merging of prosecution and adjudication functions (R. 7); that the action of officials of the Post Office Department is otherwise contrary to the provision of the Administrative Procedure Act (R. 7, 8); that petitioner is being deprived of its right to due process of law and the protection of the Administrative Procedure Act (R. 7, 8); and that the continued action in attempting to deprive petitioner of its right to the lawful use of the United States mails is arbitrary, capricious, improvident and unlawful (R. 7).

The Postmaster General moved to dismiss the complaint in the District Court. That Court granted the motion without opinion. The United States Court of Appeals for the District of Columbia Circuit affirmed on petitioner's appeal, holding that petitioner had not exhausted its administrative remedies before the Post Office Department; that (in effect) the Declaratory Judgment Act is not available to confer jurisdiction; and that in the absence of a final agency order, petitioner is not entitled to judicial intervention. The Court in its opinion (R. 31; App. 25) made no reference to the point urged by petitioner, namely, that since the Rules of Practice, amended effective January 20, 1954, under which officials of the Post Office Department were seeking to require petitioner to again defend itself before a non-independent and unlawfully constituted tribunal, were not published in the Federal Register as required by law, petitioner was entitled to judicial assistance in the enforcement of the restriction of Sec. 3 of the Administrative Procedure Act that "No person shall in any manner be required to resort to organization or procedure not so published."

Jurisdiction of the United States District Court for the District of Columbia was invoked under Sec. 306, Title 11, District of Columbia Code, 1951 ed.; the Declaratory

Judgment Act of June 25, 1948, 62 Stat. 964, as amended (28 U.S.C.A. 2201, 2202); the Judiciary and Judicial Procedure Act of June 25, 1948, 62 Stat. 930 (28 U.S.C.A. 1331); and the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, as amended (5 U.S.C.A. 1009).

VI. REASONS RELIED ON FOR ALLOWANCE OF WRIT

This case involves an important question of federal law which has not been directly settled by this Court, but should be, as to whether a citizen can be required to subject himself to unlawful and unwarranted administrative organization and procedure at the hands of a Government Agency, after twice having established his innocence of the charge laid by the Agency, before he can seek appropriate judicial relief, by which time he will have suffered irreparable harm, injury and damage. The United States Court of Appeals for the District of Columbia Circuit has decided this question in a way in conflict with what is believed to be an applicable decision of this Court, and in apparent conflict with its own decisions and the decisions of other Circuits.

The action of the Postmaster General's representatives, as disclosed by the record, appears to approach what has been called "administrative absolutism" by Judge Frank of the United States Court of Appeals for the Second Circuit in *Duquesne Warehouse Co.* v. *Railroad Retirement Board,* 148 F.2d 473, and which by the same Jurist has been referred to in his comment on the exhaustion of administrative remedies doctrine, as the "exhaustion of litigants." *Lichten* v. *Eastern Airlines,* 189 F.2d 939, 948.

The background of the instant case is set forth in detail herein under the "Statement of the Case" (Supra, p. 6). By his motion in the District Court to dismiss the complaint, the Postmaster General admitted all well pleaded facts, including, inter alia, the following:

1. There was no publication in the Federal Register of the Rules of Practice in Proceedings Under the Administrative Procedure Act, Amended Effective January 20, 1954 (R. 12; App. 31), as required by Sec. 3 of the Administrative Procedure Act (5 U.S. C.A. 1002).

2. It was not the intention of the drafters of the Rules of Practice in Proceedings Under the Administrative Procedure Act, Amended Effective November 6, 1952 (R. 9; App. 29), to provide for administrative appeals by the prosecutor of the complaint from an initial decision of the Office of Hearing Examiners for the Post Office Department, and such Rules with respect to appeals, by the language thereof taken in context, relate only to appeals by a respondent adversely affected by such an initial decision.

3. The delegation of the Postmaster General's quasi-judicial authority to a Deputy Postmaster General and his Administrative Assistant.

4. The facts relating to petitioner's business status and the several proceedings against it in the Post Office Department.

In the statement of "Questions Presented" (Supra, p. 2), petitioner has set forth the questions of law involved. On the first point (availability of declaratory or equitable judicial relief), the Court below seemed to be of the opinion (R. 33; App. 27) that the Declaratory Judgment Act, 28 U.S.C.A. 2201, 2202 (1952), conferred no jurisdiction (citing *Doehler Metal Furniture Co.* v. *Warren*, 129 F.2d 43, 45, and *Clark* v. *Memolo*, 174 F.2d 978, 980, both in the District of Columbia Circuit), and concluded (R. 32; App. 27) that petitioner should have exhausted the administrative remedies available to it before seeking judicial intervention—relying on *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, and *National Enforcement Comm'n* v. *Slim Olson, Inc.*, 221 F.2d 92.

It is petitioner's contention that the Court below erred in its interpretation of the Declaratory Judgment Act as

applied to this case, for even in the *Doehler* case, supra, the same Court asserted the general principle to be as expressed in the statute—that the Act "is an added number in a court's repertoire from which to choose the appropriate help for a party." The Court further stated that "the existence of another adequate remedy does not foreclose the use of a declaratory judgment where it is otherwise appropriate." Again in the later *Clark* v. *Memolo* case, supra, the same Court declared that the Act "was designed to provide a remedy in a case or controversy while there is still opportunity for peaceable judicial settlement," and that it is the "primary purpose of the act to have a declaration of rights not theretofore determined." While the facts in both of the above cited cases relied upon by the Court below are entirely different from the situation here presented, yet the general principles enunciated by the Court in the earlier cases, when considered in the light of the specific language of the Act, appear to fit the instant case—for there is definitely a controversy over the right of the Postmaster General or his subordinates to require petitioner to submit to unlawful procedures on the threat of destroying petitioner's lawful business; there is still an opportunity for peaceable judicial settlement; and there is sought a declaration of rights not heretofore determined.

This petitioner in its complaint in the District Court also prayed for the exercise of the equity powers of the Court, but the Court below did not also declare a lack of jurisdiction in this respect. Its rejection of declaratory judgment jurisdiction does not, therefore, appear to be consistent with the earlier declaration in the *Doehler* case, supra. See also *B. F. Goodrich & Co. et al* v. *Federal Trade Commission,* 208 F.2d 829, 834 (1953), wherein the Court of Appeals for the District of Columbia Circuit, relying in part on *Columbia Broadcasting System* v. *U. S.,* 316 U.S. 407, and *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, held that the District Court had

jurisdiction as an initial step to entertain complaint for declaratory judgment with respect to, and injunctions against, an order of an Administrative Agency, and if upon trial on the merits it develops that plaintiffs are not actually threatened with damage by way of disruption of business, then the complaints can be dismissed. Since the opinion specifically pointed out that no opinion was to be inferred as to the validity or invalidity of the order complained of, it would seem to follow that once having initially determined by trial on the merits that the threat of damage was present, the validity or invalidity of the agency's order would then have to be determined to arrive at a final decision granting or denying the relief sought. See also *Federal Communications Commission* v. *American Broadcasting Co.*, 347 U.S. 284 (1954).

Also, in *Embassy Dairy* v. *Camalier*, 211 F.2d 41 (1954), the same Court held that an action for declaratory and injunctive relief would lie and the plaintiff would prevail over a motion to dismiss, where "the complaint asserts in effect that there has been a legislative declaration of rights, that there is an inadequacy of administrative review, and that there is occasion to resort to equitable remedies." The Court went on to declare that "these are 'the elements' said by the Supreme Court in Columbia Broadcasting System v. U. S. [supra] to be 'prerequisite to judicial review'."

Nor does the opinion below seem to be consistent with determinations of other Circuit Courts of Appeals on this question. That the statute must be given liberal construction is well settled. *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123, Etc.*, 137 F.2d 176 (C.C.A. 5, 1943), aff'd 321 U.S. 590; *Donnely* v. *Mavar Shrimp & Oyster Co.*, 190 F.2d 409 (C.C.A. 5, 1951). Primary purpose of the statute is to settle actual controversies before they ripen into violations of law. *Scott-Burr Stores Corp.* v. *Wilcox*, 194 F.2d 989 (C.C.A. 5, 1952). Where there is

an actual controversy, a declaratory judgment may be granted, though the rights involved are contingent. *Pennsylvania Casualty Co.* v. *Upchurch,* 139 F.2d 892 (C.C.A. 5, 1943). A declaration was sought in *Shaughnessy* v. *Pedreiro,* — U.S. —, 99 L ed. 487, 491.

It is well established that the wrongful application of the Postmaster General's quasi-judicial powers, including the failure of his Department to accord due process of law, is subject to judicial review, and the equity powers of the federal judiciary have been invoked in numerous cases to prevent or correct a miscarriage of justice through an abuse and misuse of this power. *American School of Magnetic Healing* v. *McAnnulty,* 187 U.S. 94; *Hannegan* v. *Esquire,* 327 U.S. 146; *Reilly* v. *Pinkus,* 338 U.S. 269; *Dolan* v. *Hurley,* 297 F. 825; *Jarvis* v. *Shackelton Inhaler Co.,* 136 F.2d 116; *Consumers Union* v. *Walker,* 145 F.2d 33; *Walker* v. *Popenoe,* 149 F.2d 511, 513; *Garden City Chamber of Commerce, Inc.* v. *Wagner,* 192 F.2d 240.

The federal courts have accepted jurisdiction of challenges of the Postmaster General's quasi-judicial orders and have commented on his improper acts, without granting the relief sought because of procedural niceties. *Pike* v. *Walker,* 121 F.2d 37 (C.C.A. D.C.), cert. denied 314 U.S. 625. This Honorable Court has held that jurisdiction will lie to determine whether the provisions of the Administrative Procedure Act apply to proceedings before the Post Office Department, and an affirmative answer was settled in *Cates* v. *Haderlein,* 342 U.S. 804. In *Standard* v. *Olesen,* Appendix I, 98 L ed 1151, Mr. Justice Douglas as Circuit Justice sitting in Chambers, referred specifically to the unlawful acts of the Post Office Department, and declared that "under the law as presently written, every business, until found unlawful, has the right to be let alone. The Administrative Procedure Act . . . gives some protection to that right. The power of the Post Office Department to restrain the illegal use of the mails

is subject to that Act." In *Door* v. *Donaldson,* 195 F.2d 764, the Court of Appeals for the District of Columbia Circuit, while holding that the action of the Post Office Department was invalid, declined to accord the temporary relief sought below, on the grounds the granting or rejection thereof was not a matter of right, but of discretion. The concurring judge termed this position academic, for the District Court in giving effect to the Appellate Court's determination, could only enter final judgment for the plaintiff on proper application.

On the related question (exhaustion of administrative remedies), the Court below cited *Aircraft & Diesel Corp.* v. *Hirsch,* supra, *Allen* v. *Grand Central Aircraft Co.,* supra, and *National Enforcement Comm'n* v. *Slim Olson,* supra, in support of its conclusion. It should be noted in the *Allen* case, upon which the Court below relied in *National Enforcement Comm'n* v. *Slim Olson,* supra, this Court stated (p. 540) "that *once the right of the Government to hold administrative hearings is established,* a litigant cannot enjoin them *merely* because they might jeopardize his bank credit or otherwise be inconvenient or embarrassing. Aircraft & D. Equipment Corp. v. Hirsch, 331 U.S. 752, 777-779." (Emphasis supplied). This Court then proceeded (p. 540) to "go directly to the heart of this controversy, which is the question whether the administrative enforcement of the 1950 wage stabilization program has been validly authorized." Notwithstanding the confusion existing as to which comes first—determination of validity of the order or regulation, or determination of the fact of threatened damage upon trial on the merits—the Court below in upholding the granting of the motion to dismiss petitioner's complaint in the District Court, failed to apply either criteria in the instant case. To bring "the issues closer to focus" on the question of threatened damage, it would appear necessary to hold a trial on the merits of that issue based upon the

allegations of the complaint in that regard and the answer of the Postmaster General.[2] There would concurrently and logically develop a determination as to the heart of the controversy; namely, the validity of the Post Office Department's program.

See also *National Lawyers Guild* v. *Brownell,* — F.2d —, decided July 14, 1955 (C.C.A. D.C.), wherein the Court below sought to analyze and draw inferences from the statements of various members of this Court in their several opinions in *Joint Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123. In *National Lawyers Guild* the Court below again declared that on the basis of *Allen* v. *Grand Central Aircraft Co.,* supra, it is conclusively established that "admininstrative remedies *validly* established by regulation must be exhausted." (Emphasis supplied). It is thus inferred that the exhaustion doctrine does not apply with respect to invalidly established administrative remedies.

Thus in all of the leading and more recent cases involving the doctrine of exhaustion of administrative remedies, from *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41 (1938) and *Macauley* v. *Waterman S. S. Corp.,* 327 U.S. 540 (1946), down through *Aircraft & Diesel Corp.* v. *Hirsch,* supra (1947) and *Allen* v. *Grand Central Aircraft Co.,* supra (1954), to the more recent decisions of the United States Court of Appeals for the District of Columbia Circuit, and with all the variations of opinions and the shadings of meanings—the fact stands out that the words "validly established" have been most frequently employed by both Courts to describe the remedies to be exhausted and the regulations in question. But in the case

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[2] See *Standard* v. *Olesen,* supra, for a disclosure of one unlawful method employed by the Post Office Department in damaging, if not destroying, without a hearing, a business brought under attack by a prosecuting official. Petitioner is prepared to show that such methods are not uncommon.

at bar, the Court below did not refer to this often enunciated principle—relying on the *Aircraft & Diesel Corp.* and *Allen* decisions of this Court for support of its general conclusion. Thus the Court below failed to recognize the distinctions here, which should bring this case, as one of first impression, well within the exceptions to the doctrine of exhaustion of admininstrative remedies.

Likewise, the Court below apparently failed to apply the general principles asserted in its decision in *Isbrandtsen Co.* v. *U. S.*, 211 F.2d 51, cert. denied 347 U.S. 99; i.e., that "'the ultimate test of reviewability [by court, of action of administrative agency] is not to be found in over-refined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control'" (citing *Columbia Broadcasting System* v. *U. S.*, supra); that administrative orders are ordinarily reviewable when "'they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process'" (citing *Chicago and Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103); and that "under this test, a final order need not necessarily be the very last order" (citing *Algonquin Gas Transmission Co.* v. *Federal Power Commission*, 201 F.2d 334, 337).

The instant case is also readily distinguishable from *Allen* v. *Grand Central Aircraft Co.*, supra, and *Aircraft & Diesel Corp.* v. *Hirsch*, supra, in that here this petitioner is being harassed by the continued efforts of a prosecuting official to either put petitioner out of business by closing the mails to it, or requiring it to submit to censorship—after petitioner has twice successfully defended itself before an independent hearing tribunal created under the requirement of the Administrative Pro-

cedure Act. It is not inconvenience or embarrassment that is the crux of petitioner's complaint, but the constantly overhanging direct threat of the prosecuting official to force petitioner out of the mail-order business, or to force it to submit to censorship, plus the further restriction upon petitioner's lawful conduct of its publishing business because of the necessity to curtail its legitimate advertising campaigns, which have to be developed and put into effect, with the expenditure of substantial sums of money, weeks or months before such advertising actually appears in the public prints, and which would be a complete loss to petitioner should the threat be carried out before or concurrent with the appearance of such advertising in the public prints. Therefore, the impact of such unlawful action seriously affects petitioner's right to conduct a lawful business, even though there has as yet been no stoppage of petitioner's mail or stoppage of payment of postal money orders payable to it. There thus arises not only the question of the deprivation of petitioner's right to due process of law, but the question of the protection of the First Amendment to the Constitution with respect to freedom of speech and of the press. Another constitutional question basic in this case involves the matter of the assumption of legislative powers by the executive branch in assuming powers not specifically authorized by Congress, as hereinbefore described.

Again the situation presented by the case at bar can be likened somewhat to the situation in *Far East Conference* v. *U. S.*, 342 U.S. 570, where jurisdiction of the challenge was entertained and relief granted; in *U. S.* v. *Interstate Commerce Commission*, 337 U.S. 426; and in *S. S. W., Inc.* v. *Air Transport of America, et al*, 191 F.2d 658 (C.C.A. D.C.) (which the New Jersey District Court in *Slick Airways* v. *American Airlines*, 107 F.Supp. 199 declined to follow by refusing to recognize the exhaustion doctrine as applying to any phase of a similar situation); for here also the agency (Postmaster General) has no

authority to pass upon or grant relief against continued acts by his subordinates and in his name, which are challenged as not only being unconstitutional, but contrary to statute, after an original complaint has been disposed of in a manner favorable to a respondent after a full and fair agency-delegated hearing. The sounder premise seems to be that the doctrine is conditioned not upon the ability of the administrative agency to grant a remedy, but upon the presence of problems calling for the kind of expert technical consideration not here present which only the administrative agency is in a position to give. *Apgar Travel Agency* v. *International Air Transport Agency,* 107 F.Supp. 706 (S.D.N.Y. 1952). Here the agency is neither qualified nor even inferentially empowered to initially pass upon challenges against its unconstitutional and otherwise unlawful acts, and the relief or determination sought is beyond the competence of the agency to grant. The problem of law presented here is not one for agency consideration, or on which the professional assistance of the agency is necessary to reach a just solution. To require this petitioner and others similarly situated [3]—whose "basic freedoms" (See *Stanard* v. *Olesen,* supra) are being impinged upon by the Post Office Department—to go through with unlawful and extensive further procedures amounting to a denial of due process of law, on the chance, as suggested by the Court below, that no harm may result, to wait [4] a decision which

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[3] *Parker* v. *Arthur E. Summerfield, Postmaster General,* C. A. No. 4891-54, in the United States District Court for the District of Columbia, is pending awaiting trial or other disposition on complaint and answer. *In re National Trades Day Association,* Hearing Examiner's Docket No. 2/375, has been pending since November 1954 in the Department on notice of the prosecuting Solicitor's intention to appeal to the Solicitor.

[4] Petitioner is prepared to show that numerous other busuiness firms brought into an adversary Departmental procedure, have spent months and years awaiting the next move of the prosecuting officials, always with the fear of having their mail summarily seized.

is likely to be influenced by the prosecutor, and possibly find their mail seized and payments of their postal money orders refused, either summarily without notice on the prosecutor's order, or upon a formal order entered of record by a de facto and non-independent tribunal in the Department,—is manifestly an unjust and unconscionable practice, where, as in the instant case, procedural rules are changed at will without notice or public hearing, and without publication as required by law. The business concern, if denied judicial relief against invalid and unlawful acts of the prosecuting official on the theory of exhaustion of administrative remedies, must attempt (as one writer expressed it) "to exhaust an inexorably inexhaustible administrative remedy," when, if there be access to the courts, the manifest justice of its case would have removed the stigma. *Netterville, The Administrative Procedure Act; A Study in Interpretation,* 20 Geo. Wash. Law Review 1, 85-86 (1951). See also, *Schwartz, Primary Administrative Jurisdiction and the Exhaustion of Litigants,* 41 Georgetown Law Journal 495-505 (May 1953).

In the instant case, therefore, the record establishes not only that a controversy between petitioner and the Post Office Department has arisen within the meaning of the Declaratory Judgment Act, but that admittedly the Department has no right to hold any further administrative proceedings or to require petitioner in any manner to resort to organization or procedure not published in the Federal Register as required by Sec. 3 of the Administrative Procedure Act. See *Hotch* v. *U. S.*, 212 F.2d 280, and *Woods* v. *Benson Hotel Corp.*, 75 F.Supp. 743. The Administrative Procedure Act is to be given a hospitable interpretation. *Shaughnessy* v. *Pedreiro,* — U.S. —, 99 L ed 487, 491. See also *Fed. Broadcasting System* v. *F.C.C.*, — Fed.2d — (C.C.A. D.C., 7/28/55, No. 12252).

On the point of unlawful delegation to a Deputy Postmaster General of the quasi-judicial power granted to the Postmaster General alone under the statute (39 U.S.C.

259a), the Government throughout in the defense of this action, has relied solely on Reorganization Plan No. 3 of 1949 (63 Stat. 1066), under the Reorganization Act of 1949 (63 Stat. 203, 5 U.S.C. 133Z-15). It appears to be well established, however, that unlimited authority of an administrative officer to delegate the exercise of his powers, is not lightly to be inferred, since it is a power capable of oppressive use, and considered in its statutuory setting and without specific statutory authority to so do, it cannot be inferred that it was the intention of Congress to give unrestricted authority to delegate powers which it has in specific terms granted only to the responsible head of the agency. See *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357. It is also clear that the Reorganization Act of 1949, supra, having as it does, concern only with the business as distinguished from the judicial authority of an executive agency, cannot be inferred as an intention of Congress to give unrestricted authority of delegation of such quasi-judicial powers.

This petitioner is further prepared to show that the Post Office Department by its actions described herein, is again seeking ways and means to circumvent the Administrative Procedure Act, which it did for nearly five years until the decision in *Cates* v. *Haderlein*, supra; that it is again, by the methods described, seeking to destroy the effectiveness of the independent hearing examiner system; and that it is again attempting to merge the functions of prosecution and adjudication, by creating a non-independent, non-statutory tribunal.[5] As was said in *Wong*

[5] Under date of May 17, 1954, new Rules of Practice in Proceedings Under the Administrative Procedure Act were adopted by the Post Office Department, in which the statutory quasi-judicial powers of the Postmaster General were delegated to the Solicitor for the Post Office Department in all cases arising after May 17, 1954. 39 CFR, 1954 Supp., 201.1-201.27. Thus the final agency authority is now the head of the office which files and prosecutes complaints before the Office of Hearing Examiners.

Yang Sung v. *McGrath,* 339 U.S. 33, 41—"More fundamental however was the purpose [of the Administrative Procedure Act] to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge." Petitioner believes that this is another cogent reason why this Court should intervene and determine the rights of petitioner and of others brought into contest with prosecuting officials of the Post Office Department.

The Court below in its opinion speculated upon what might or might not happen if petitioner had submitted to the procedures about which it complains. It is not understood that the doctrine of exhaustion of administrative remedies precludes a citizen invoking rights and guarantees given by the Constitution and statute, merely because there is a possibility, as distinguished from a probability, that a citizen may ultimately prevail in an administrative proceeding; especially when there is no remedy as such available for the citizen to exhaust after having twice accepted the burden of defending himself with a successful result.

The instant situation is somewhat analogous to the situation in *U. S. Ex Rel Accardi* v. *Shaughnessy,* 347 U.S. 260, wherein this Court held that petitioner was entitled to an opportunity to try to prove before the District Court his allegation that it was impossible for him "to secure fair consideration of his case."

On another related point—whether a prosecuting official in an administrative proceeding may appeal from a decision against him by a validly constituted hearing tribunal, even assuming, arguendo, that valid rules had been promulgated and published as required by the Administrative Procedure Act—attention is invited to *Lee* v. *Civil Aeronautics Board,* — F.2d — (No. 12433 in the United States Court of Appeals for the District of Co-

lumbia Circuit, decided June 9, 1955), wherein the Court stated "We have found no case in which agency action has been reviewed on the application of an official whose function is to prosecute claims in and for the same agency." While the *Lee* case, supra, is not directly in point, because there the prosecuting official's attempted appeal was from the decision of the agency, yet there is somewhat of an analogy in that the agency itself conducted the hearing on the prosecutor's complaint and decided against the complainant-prosecutor. Here, the prosecutor would be in the same position, if, without specific agency authority, he starts a chain of appeals from a decision after a proper agency-delegated hearing, to a de facto agency representative, and then, if again not satisfied, to a Federal court. Since this he cannot do, there is thus cogent reason why he cannot start the appeal processes, in the absence of specific and valid authority. It is also pointed out that there is no statutory right of review of an order of the Post Office Department in an administrative proceeding. The sole remedy is through the equity and declaratory powers of the Federal judiciary.. Section 10(a), Administrative Procedure Act, 5 U.S.C. 1009.

This Honorable Court, therefore, should settle the questions of federal law presented by this petition, not only because there is a conflict between the decision below and the decisions of this Court, but because there has been sanctioned a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

VII. CONCLUSION

Wherefore petitioner respectfully prays that this Honorable Court grant its petition; issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit; hear,

consider and determine the questions presented; reverse the judgment and order of the United States Court of Appeals for the District of Columbia Circuit; and grant such other and further relief as to the Court may seem just and equitable.

HORACE J. DONNELLY, JR.
ARTHUR V. SULLIVAN, JR.
Attorneys for Petitioner

APPENDIX

United States Court of Appeals for the District of Columbia Circuit Filed Jun 30 1955
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12506

CADILLAC PUBLISHING COMPANY, INC.,
a Corporation, APPELLANT,

v.

ARTHUR E. SUMMERFIELD, Postmaster General
of the United States, APPELLEE.

Appeal from the United States District Court
for the District of Columbia

Decided June 30, 1955

Mr. Horace J. Donnelly, Jr., with whom *Mr. Arthur V. Sullivan, Jr.*, was on the brief, for appellant.

Mr. Frank H. Strickler, Assistant United States Attorney, with whom *Messrs. Leo A. Rover*, United States Attorney, *Lewis Carroll* and *William F. Becker*, Assistant United States Attorneys, were on the brief, for appellee.

Before WILBUR K. MILLER, WASHINGTON and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge:* The District Court dismissed appellant's complaint wherein it sought both a declaratory judgment that certain actions of the Post Office De-

partment were unlawful, and an injunction to restrain the Postmaster General and his subordinates from proceeding further against appellant. Appellant thereupon filed a motion for reconsideration and for permission to file an amended complaint which motion was denied, and this appeal followed.

Appellant alleged that the Acting Solicitor of the Post Office Department filed with the office of Hearing Examiners for the Department a charge that appellant was conducting an unlawful enterprise through the mails in violation of the obscenity provisions of Title 39 U.S.C. § 259a (1952); that after the Hearing Examiner in an initial decision had dismissed the complaint, the Solicitor filed a notice of intention to appeal and subsequently, a brief on appeal to the Postmaster General; that appellant moved to dismiss the Solicitor's appeal on the ground that the Department's rules of practice made no provision for such an appeal; that the motion to dismiss was unlawfully denied by the Deputy Postmaster General on February 15, 1954 in that the Postmaster General could not validly delegate his authority to his Deputy; and that under date of May 6, 1954, appellant was advised that it must make reply to the Solicitor's appeal brief by May 22, 1954.

Without further steps before the Department, appellant commenced this action. Appellant had been advised that the Deputy Postmaster General had denied its motion to dismiss the Solicitor's appeal and that it must reply to the Solicitor's appeal brief, but it chose not to pursue its administrative remedy. Had appellant met the issues within the Department, it is entirely possible that the Hearing Examiner's initial decision would have been affirmed by the Postmaster General. There has been issued no order returning mail addressed to the appellant, indeed none can issue until the administrative process has been completed. It is quite possible appellant so

realizes. We cannot fail to note that the proceedings are still pending in the Department.

We conclude that appellant should have exhausted the administrative remedies open to it before seeking judicial intervention. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752 (1947); *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954); *National Enforcement Comm'n* v. *Slim Olson, Inc.,* —— U.S. App. D.C. ——, 221 F. 2d 92 (D.C. Cir. 1955).

Appellant gains nothing in his attempt to rely upon the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1952), for that Act was never intended to confer jurisdiction where none exists. *Doehler Metal Furniture Co.* v. *Warren,* 76 U.S. App. D.C. 60, 62, 129 F. 2d 43, 45 (D.C. Cir. 1942), *cert. denied,* 317 U.S. 663 (1942); *Clark* v. *Memolo,* 85 U.S. App. D.C. 65, 67, 174 F. 2d 978, 980 (D.C. Cir. 1949).

So, the case comes to this, the Administrative Procedure Act, 5 U.S.C. § 1009(c)(1952), expressly provides that "Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action . . . ." "That proceedings before the Department are subject to the Administrative Procedure Act has been settled in *Cates* v. *Haderlein,* 342 U.S. 804," as appellant quite properly tells us in his brief. See also, *Door* v. *Donaldson,* 90 U.S. App. D.C. 188, 195 F. 2d 764 (D.C. Cir. 1952). We will stand on that, for in the absence of a final agency order, the record shows no more than that appellant complains of a District Court order which refused judicial review of an intermediate agency order which had denied appellant's motion to dismiss an intra-agency appeal.

Affirmed.

United States Court of Appeals for the District of Columbia Circuit Filed Jun 30 1955
Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955.

No. 12,506

Cadillac Publishing Company, Inc.,
a Corporation, Appellant,

v.

Arthur E. Summerfield,
Postmaster General of the United States,
Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Washington and Danaher, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 30, 1955.

Per Circuit Judge Danaher.

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Rules of Practice in Proceedings Under the Administrative Procedure Act, Amended Effective November 6, 1952

§ 150.404 Notice of Hearing. If the Chief Hearing Examiner shall determine that the complaint states facts sufficient to show the probable need for administrative action by the Postmaster General, he shall issue a notice of hearing to the respondent.

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§ 150.422 *Hearing Examiner's Decision.* (a) Where the respondent, having filed answer, fails to appear at the hearing, the hearing examiner shall receive such proof as he may deem proper in support of the allegations of the complaint, and shall make and file a decision from which no appeal may be taken by the respondent to the Postmaster General, and the Postmaster General may thereafter issue the order recommended in the complaint without further notice to the respondent.

(b) The hearing examiner may render an oral initial decision at the close of the hearing if the nature of the case and the public interest so warrant. Otherwise, he may render such initial decision at a later date as hereinafter provided.

(c) After the date specified by order of the hearing examiner for the filing of proposed findings of fact, conclusions of law and supporting reasons pursuant to the provisions of § 150.421 of this subpart, the hearing examiner shall make and file an initial decision which shall become the final decision unless an appeal therefrom is perfected in the manner provided in § 150.423 of this subpart.

(d) The initial decision of the hearing examiner shall include (1) findings and conclusions with the reasons therefor upon all the material issues of fact, law or discretion presented on the record; and (2) an appropriate

order for execution by the Postmaster General or a denial of the order requested in the complaint.

(e) A copy of the hearing examiner's initial decision shall be served upon each party who participated in the hearing.

§ 150.423 *Appeal from Initial Decision.* (a) Any party of record in a proceeding, except those who failed to answer the complaint or having answered fail to appear at the hearing, may file a notice of intention to appeal to the Postmaster General in accordance with paragraph (b) hereof.

(b) A notice of appeal must be filed within the time limit fixed by order of the hearing examiner, of which a copy shall be served upon each party who participated in the hearing. If an initial decision is rendered orally by the hearing examiner at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which notice of appeal must be filed. Such time limit shall in no case exceed 10 days from the time of the aforesaid service upon or notice to such parties.

• • • •

(e) The brief on appeal shall be filed within the time specified therefor by the hearing examiner. Opposing brief shall be filed within the time allowed therefor by the hearing examiner. If the respondent fails to file the notice of appeal within the time specified therefor, or, having filed notice of appeal, fails to file the appeal brief within the time specified therefor, the Postmaster General may thereafter issue the order found in the hearing examiner's initial decision to be appropriate for issuance upon the basis of the record.

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§ 150.424 *Postmaster General's Orders.* (a) Copies of the Postmaster General's decision and order shall be

incorporated in the record of the proceeding. The order shall be published in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to put the provisions of said order into effect.

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§ 150.425 *Application for Modification or Revocation of Orders.* (a) Any party against whom an order has been issued by the Postmaster General may file with the Docket Clerk an original and three copies of an application for modification or revocation thereof. Said application shall set forth the grounds upon which it is based; must contain a statement to the effect that the unlawful enterprise against which the order is directed is no longer being conducted under the name or names specified in the order or any other name and that the unlawful scheme will not be resumed in the future under such names or any other names; and it must be sworn to by the applicant.

(b) The Docket Clerk shall deliver a copy of such application to the Solicitor. The Chief Hearing Examiner shall assign the matter to a hearing examiner who shall set a date for the filing of the Solicitor's reply to such application.

(c) A copy of the Solicitor's reply to such application shall be delivered to the applicant by the Docket Clerk. Thereafter the hearing examiner may either enter an order denying such application or transmit the application, together with his recommendation that it be granted in whole or in part, to the Postmaster General for final decision and action.

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Rules of Practice in Proceedings Under the Administrative Procedure Act, Amended Effective January 20, 1954

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§ 150.404 *Notice of Hearing.* Upon filing of the complaint the Administrative Assistant to the Deputy Postmaster General shall issue a notice of hearing. Said notice of hearing shall contain the date and place of hearing, the date upon which answer to the complaint may be filed, the name of the hearing examiner to whom the case has been assigned and a reference to the effect of failure to file answer.

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§ 150.422 *Hearing Examiner's Decision.* (a) Where the respondent, having filed answer, fails to appear at the hearing, the hearing examiner shall receive such proof as he may deem proper in support of the allegations of the complaint, and shall make and file a decision from which there is no appeal. The order recommended in the complaint may, in such circumstances, be issued without further notice to the respondent.

(b) The hearing examiner may render an oral initial decision at the close of the hearing if the nature of the case and the public interest so warrant. Otherwise, he may render such initial decision at a later date as hereinafter provided.

(c) After the date specified by order of the hearing examiner for the filing of proposed findings of fact, conclusions of law and supporting reasons pursuant to the provisions of § 150.421 of this subpart, the hearing examiner shall make and file with the Docket Clerk an initial decision which shall become the final decision unless an appeal therefrom is perfected in the manner provided in § 150.423 of this subpart.

(d) The initial decision of the hearing examiner shall include findings and conclusions with the reasons therefor upon all the material issues of fact, law or discretion presented on the record.

(e) The Docket Clerk shall cause a copy of the hearing examiner's initial decision to be mailed to each party who participated in the hearing.

§ 150.423 *Appeal from Initial Decision.* (a) Any party of record in a proceeding, except those who failed to answer the complaint or having answered fail to appear at the hearing, may file a notice of intention to appeal to the Postmaster General in accordance with paragraph (b) hereof.

(b) A notice of appeal must be filed with the Docket Clerk within 10 days from the time of mailing the initial decision to the parties. If an initial decision is rendered orally by the hearing examiner at the close of the hearing, he may then orally give notice to the parties participating in the hearing of the time limit within which notice of appeal must be filed. Such time limit shall in no case exceed 10 days from the time of the aforesaid service upon or notice to such parties.

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(e) Upon the filing of a notice of appeal the Administrative Assistant to the Deputy Postmaster General will notify the parties when briefs and replies thereto may be filed. The time to file briefs may be extended only upon application to the Administrative Assistant to the Deputy Postmaster General who will grant or deny at the direction of the Deputy Postmaster General. If the respondent fails to file the appeal brief within the time prescribed, he will be deemed to have abandoned his appeal and the matter will proceed as though notice of appeal had not been filed.

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§ 150.424 *Final Orders.* (a) Copies of the final decision and order shall be incorporated in the record of the proceeding. The Administrative Assistant to the Deputy Postmaster General shall cause the order to be pub-

lished in the Postal Bulletin and transmitted to such postmasters and other officers and employees of the postal service as may be required to put the provisions of said order into effect.

• • • •

§ 150.425 Application for Modification or Revocation of Orders. (a) Any party against whom an order has been issued may file with the Docket Clerk an original and three copies of an application for modification or revocation thereof. Said application shall set forth the grounds upon which it is based; must contain a statement to the effect that the unlawful enterprise against which the order is directed is no longer being conducted under the name or names specified in the order or any other name and that the unlawful scheme will not be resumed in the future under such names or any other names; and it must be sworn to by the applicant.

(b) The Administrative Assistant to the Deputy Postmaster General shall call upon the Solicitor for such written reply to the application as the Solicitor may care to file.

(c) A copy of the Solicitor's reply to such application shall be delivered to the applicant by the Docket Clerk. Thereafter an order granting or denying such application will be issued.

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DELEGATIONS OF AUTHORITY

1. By the Postmaster General to the Deputy Postmaster General. Postmaster General Order No. 55507 dated January 13, 1954, reads as follows:

"Pursuant to authority of section 1(b) of Reorganization Plan No. 3 of 1949 (63 Stat. 1066), authority is hereby delegated to the Deputy Postmaster General to

execute and perform in his own name all powers, functions and duties conferred by law upon the Postmaster General, including authority to modify, suspend, or rescind orders, instructions, and regulations which have heretofore, or which may hereafter be issued in the name of the Postmaster General, except that I do hereby reserve to the Postmaster General exclusive authority to modify, suspend, or rescind all or any part of the authority delegated to the Deputy Postmaster General by this Order.

"The Deputy Postmaster General is hereby authorized to delegate to any officer, employee, or agency of the Post Office Department designated by him such of the powers, functions and duties delegated to him by this Order as he deems appropriate.

"All prior delegations made by me are to remain in full force and effect until changed by order of the Postmaster General or the Deputy Postmaster General."

Pursuant to this order the Deputy Postmaster General will exercise final authority and will issue agency decisions with respect to matters covered by the foregoing rules to the extent that such final authority is not redelegated.

2. By the Deputy Postmaster General to the Administrative Assistant to the Deputy Postmaster General. Deputy Postmaster General Order No. 55510 dated January 14, 1954, reads in part as follows:

"1. THE ADMINISTRATIVE ASSISTANT TO THE DEPUTY POSTMASTER GENERAL, is authorized to issue in his name and revoke when revocation is warranted the orders which the Postmaster General is authorized to issue by sections 255, 259, 259a and 732 of title 39, U. S. Code, in the following circumstances and conditions:

"(a) When the order to be issued involves and concerns persons residing outside the United States its Territories and Possessions and for whom an agency hearing under the Administrative Procedure Act (5 U.S.C. 1001 et seq.) is not available.

"(b) When the order to be issued involves and concerns residents in the United States its Territories and Possessions who, having been offered opportunity for agency hearing, have failed to file answer as provided by the Post Office Department Rules of Practice in Proceedings under the Administrative Procedure Act (5 U.S. Code, §§ 1001 et seq.)."

Pursuant to this order the Administrative Assistant to the Deputy Postmaster General will exercise within the limitations above set forth final authority and will issue agency decisions with respect to matters covered by the foregoing rules.

Published by direction of
the Deputy Postmaster General.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 428

CADILLAC PUBLISHING COMPANY, INC., PETITIONER

v.

ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (Pet. App. pp. 25-27) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955. The petition for a writ of certiorari was filed on September 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the courts below correctly declined to review the intermediate

action of the Deputy Postmaster General in denying petitioner's motion to dismiss an intra-agency appeal.

STATEMENT

On May 21, 1954, petitioner filed a complaint in the District Court (R. 2-8) alleging that the Acting Solicitor of the Post Office Department had on February 24, 1953, filed a complaint with the Office of Hearing Examiners of the Post Office Department charging the Cadillac Publishing Co. with conducting an unlawful enterprise through the use of the United States mails in violation of the obscenity provisions of 39 U. S. C. 259a (R. 3-4); that after a hearing before the Hearing Examiner the Solicitor's complaint was dismissed for failing to set forth facts sufficient to constitute a violation of the invoked statute (R. 4); that following the dismissal of the complaint, the Solicitor for the Post Office Department, on November 27, 1953, filed with the Office of Hearing Examiners a notice of intention to appeal to the Postmaster General from the Hearing Examiner's decision and, under date of November 27, 1953, a brief on appeal was filed (R. 4); that petitioner thereupon moved to dismiss the Solicitor's appeal and to strike the notice of intention to appeal and the appellate brief on the ground that the Post Office Department's Rules of Practice in Proceedings under the Administrative Procedure Act did not provide for an appeal by the Solicitor from an adverse decision by the Office of Hearing Examiners (R. 4-5); and that on February 15, 1954, the Deputy Postmaster General denied the motion to dismiss the Solicitor's appeal and fixed a time for petitioner to reply to the appeal (R. 4-5).

The complaint filed in the District Court prayed for a declaratory judgment to the effect that neither the

Postmaster General nor any subordinate official is authorized by law to reexamine the matters and facts decided by the Office of Hearing Examiners; and that the action of the Postmaster General in delegating his quasi-judicial authority to a subordinate and the action of the Solicitor in attempting to obtain a reversal of the Hearing Examiner's decision "is and are, null, and void and of no effect" (R. 8). It further prayed that the Postmaster General and his subordinates be restrained, *pendente lite* and permanently, from proceeding further in the matter involving petitioner (R. 8).

The complaint was dismissed by the District Court. On appeal, the Court of Appeals noted that, as matters stood in the Post Office Department, the complaint against petitioner had been dismissed by the Hearing Examiner, that no order with respect to petitioner's mail had been issued, and that none could issue until the administrative process was completed. It then held that petitioner "should have exhausted the administrative remedies open to it before seeking judicial intervention" (Pet. 27), and affirmed.

ARGUMENT

While the petition advances a number of broad questions for this Court's consideration (Pet. 2-3), the record, in the words of the court below, "shows no more than that appellant complains of a District Court order which refused judicial review of an intermediate agency order which had denied appellant's motion to dismiss an intra-agency appeal" (Pet. 27). And the decision of the Court of Appeals rests entirely on the narrow ground that petitioner "should have exhausted the administrative remedies open to it before seeking judicial intervention" (Pet. 27). Consequently, the

case presents no question which warrants further review by this Court.

1. The gravamen of petitioner's complaint in the District Court is directed against the denial by the Deputy Postmaster General of petitioner's motion to dismiss the Solicitor's appeal from an order of the Hearing Examiner which dismissed the agency's complaint filed against petitioner. Thus, petitioner has sought judicial intervention at a time when the agency's complaint against it stands dismissed and at a time when the only adverse agency determination is a denial of the motion to dismiss the intra-agency appeal by the Solicitor. Clearly, where petitioner's only ground of complaint relates to a procedural ruling at an intermediate stage of the administrative process, it cannot be said, for purposes of judicial intervention, that there has been an exhaustion or even a pursuit of available administrative remedies which would justify, as petitioner urges, judicial interference or superintendence. The decisions of the courts below refusing to interfere with the intermediate administrative processes are therefore correct and are in harmony with the repeated holdings of this Court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Federal Power Comm'n* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383-384; *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 543; *Federal Power Comm'n* v. *Arkansas Power & Light Co.*, 330 U.S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Securities & Exchange Comm'n* v. *Otis & Co.*, 338 U.S. 843; *Gusik* v. *Schilder*, 340 U.S. 128; *Public Service Comm'n of Utah* v. *Wycoff Company, Inc.*, 344 U.S. 237; *Franklin* v. *Jonco Aircraft Corp.*, 346 U.S. 868, summarily reversing 114 F. Supp.

392 (N.D. Tex.); *Public Utilities Comm'n of California* v. *United Air Lines,* 346 U.S. 402.[1]

2. In addition to the question upon which the court below decided the case, the petition suggests further questions (Pet. 2) dealing with such matters as (1) the jurisdiction of the federal courts, (2) the interpretation and construction of the Administrative Procedure Act, and (3) the delegability of the "quasi-judicial" powers of the Postmaster General to his subordinates. These are questions, however, which, if they presently exist at all, may wholly disappear or become moot once the administrative process is permitted to run its course. In this respect, therefore, petitioner's suit is likewise premature (*Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772-773), since these questions are inappropriate for judicial consideration at this time.[2]

---

[1] Because of the preliminary and procedural character of the agency action underlying petitioner's complaint, the result below is compelled by the terms of the Administrative Procedure Act, 5 U.S.C. 1009(c), which provides in pertinent part that "* * * Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *"

[2] Petitioner's assertions with respect to the inadequacy and illegality of the administrative processes and the present and prospective hardship resulting from the denial of judicial intervention at this time are plainly without merit. It is well settled that the rule requiring the exhaustion of administrative processes cannot be circumvented by considerations of expense, annoyance, and inconvenience, which are common attributes not only of administrative proceedings, but of any lawsuit. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 51-52; *Yakus* v. *United States,* 321 U.S. 414, 434; *United States* v. *Morgan,* 313 U.S. 409; *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752; *Franklin* v. *Jonco Aircraft Corp.* 346 U.S. 868, summarily reversing 114 F. Supp. 392. (N.D. Tex.)

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER, 1955.

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